STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY NELSON,

Defendant-Appellant.

UNPUBLISHED
December 21, 1999

No. 208785
Wayne Circuit Court
LC No. 97-501435

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for which he was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to consecutive terms of eight to fifteen years and two years, respectively. We affirm but remand for completion of a sentencing information report (SIR).

Defendant's first claim of error relates to the admission of rebuttal testimony offered by Michelle Brookins. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The majority of Brookins' testimony was proper rebuttal because it contradicted testimony given by defendant on direct examination and expanded upon during cross examination. *Figgures*, *supra* at 399; *People v Losey*, 413 Mich 346, 352 n 5; 320 NW2d 49 (1982). However, Brookins' testimony regarding defendant's gun should have been offered in the prosecutor's case in chief; it was improper rebuttal. *Figgures*, *supra* at 401; *Losey*, *supra*. Likewise, Brookins' testimony about defendant's nickname and his call asking for a ride were improper rebuttal. *Id*. Nonetheless, given the insignificance of defendant's nickname, other testimony regarding the facts surrounding defendant's arrest, and the overwhelming evidence linking defendant to the crime, it is not "more probable than not" that the improper rebuttal testimony was outcome determinative. *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999). Accordingly, appellate relief is not warranted. *Id.*

Defendant next asserts that he is entitled to resentencing because the court sentenced him without the benefit of a SIR. It is error for the trial court to fail to prepare a SIR. *People v Yeoman*,

218 Mich App 406, 419; 554 NW2d 577 (1996). However, because defendant was sentenced as an habitual offender, he lacks standing to raise this issue and this Court's "only remaining inquiry is the proportionality of the sentence itself." *Id.* at 421-422. Given defendant's criminal history, the circumstances surrounding the present offense, and the fact that the trial court did not impose an enhanced sentence, we find that defendant's sentence is proportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Pursuant to *People v Zinn*, 217 Mich App 340, 350; 551 NW2d 704 (1996), and MCR 7.215(H)(1), we remand for the administrative task of completing a written SIR.

Defendant next contends that he is entitled to a new trial because, during deliberations, the jury was allowed to view a photograph not received into evidence. Although the trial court did not formally receive the exhibit into evidence, the record shows that defense counsel stipulated to its admission, it was published to the jury during trial without objection, and it was submitted to the jury during deliberations without objection. There being no prejudicial error, *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980) (Riley, J.), we find no basis for reversal.

Next, we reject defendant's claim that the court erred in including CJI2d 7.8 in its instructions to the jury. The instruction appropriately "apprise[s] the jury of the proper considerations in determining whether to accept or reject eyewitness identifications." *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996), vacated 217 Mich App 801 (1996), approved 220 Mich App 662, 678; 560 NW2d 657 (1996). Further, the court was not required to include paragraph (4) of CJI2d 7.8 because it was neither requested nor supported by the evidence, there being no testimony that the victims failed to identify defendant prior to an in-court identification.

Lastly, defendant seeks production of a transcript of the jury voir dire pursuant to *People v Bass (On Rehearing)*, 223 Mich App 241, 258-260; 565 NW2d 897 (1997), which held that, despite MCR 6.425(F)(2) to the contrary, a transcript of voir dire must be provided in all cases where, as here, appointed appellate counsel was not the indigent defendant's trial counsel. Because the transcripts in this case were ordered and filed before May 6, 1998, defendant did not timely request a voir dire transcript, and did not timely raise the issue on appeal, MCR 7.212(A)(1)(a) (iii), *Bass* is inapplicable here. *People v Neal*, 459 Mich 72, 81; 586 NW2d 716 (1998).

Affirmed but remanded for preparation of a SIR. Jurisdiction is not retained.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra